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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 471

CHARLES STEVENSON, HEYWARD BURRELL, FRANK HARLEY, *Petitioners*

vs.

RICHARD REED, ARTHUR PAGE, DANIEL TYLER, ET AL., TRUSTEES

and

FIRST BAPTIST CHURCH OF MARSHALL HEIGHTS, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Supreme Court of the United States:

Petitioners pray for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia vacating petitioners default judgment which had obtained for more than 2 years.

OPINION BELOW

The opinion of the court below has not, yet, been officially reported. A copy of the opinion and judgment is hereunto annexed as the Appendix.

JURISDICTION

The judgment of the Court of Appeals was issued on the 20th day of June, 1957. The jurisdiction of the Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether after one year, eleven months and 16 days the respondents may be entitled to the setting aside of the default judgment to quiet title to real estate taken against them.

2. Because no notice was given them under Rules 5 (a) and (b), and 55 (b) (2) of the Federal Rules of Civil Procedure as to the entry of said default.

3. Because respondents allegedly did not receive notice of pre trial pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rules 13 and 14 of the local Rules of the United States District Court for the District of Columbia, even though said notice was mailed to them.

4. Does Rule 60 (b) (6) afford relief to litigants whose counsel failed to be conversant with the progress of their litigation for a period of more than a year?

5. Does the decision of the District Court, affirmed by the Court of Appeals conflict with the decision of this court in the case of Klappott vs. United States, 336 U.S. 942?

6. Should the construction of Rule 55 (b) of the Federal Rules of Civil Procedure be expanded so as to embrace pre trial proceedings?

7. Does the decision of the District Court, affirmed by the Court of Appeals, conflict with the case of U.S. vs. Karahalias, 2 Cir. (1953), 205 F. 2d 331, at Page 334?

STATEMENT OF THE CASE

Petitioners are founders of the First Marshall Heights Baptist Church, having founded said church on August 18th, 1938. That on said date petitioner, Burrell's wife was elected as the first clerk of said church. That thereafter on September 30th, 1938, petitioner, Stevenson was elected to the chairmanship of the Deacon Board while petitioner, Burrell, was elected Senior Deacon of said church, and on November 15th, 1938, petitioners were elected to the Board of Trustees of said church. Petitioners out of their own funds purchased two lots upon which subsequently the 13 original members paid for the material used in the construction of said church and the petitioners herein, of their own labor, actually built the said church, the completion of which was in the month of August 1940. That thereafter the said 13 members together with 107 new members worshipped in said edifice until the month of October, 1951. At which time respondents joined in a conspiracy to remove the petitioners from their respective offices in said church. That the said conspiracy culminated in the respondents ousting the petitioners from their respective offices and expulsion from the church. That in furtherance of the said conspiracy the respondents did on the 7th day of April, 1951, join in a certificate of incorporation, without the authority of the congregation of the church. As a result of the foregoing the petitioners filed their complaint in the United States District Court for the District of Columbia in Civil Action No. 1996-53, to Quiet Title to Real Estate and praying among other things for the removal of respondents from the occupancy of Lots 14 and 15 in Square 5334, and that title to said real estate be quieted in petitioners. To this complaint the respondents duly filed their answer denying all material allegations of the complaint and asserting title in the respondents, First Baptist Church of Marshall Heights, District of Columbia, Inc. Issues were accordingly joined. Petitioners are record titleholders. On October 20th, 1954,

notices of pre trial were mailed by the Assignment Commissioner, D.C., to all of the parties to the litigation. On October 28th, 1954, pursuant to said pre trial notices, counsel for petitioners and defendant, American Security and Trust Co., appeared for pre trial of the cause and the issues raised by the pleadings. Neither respondents nor their counsel appeared for pre trial, even though notices were mailed to them by the said Assignment Commissioners. Upon pre trial, the pre trial judge dismissed the complaint against defendant, American Security and Trust Co., and directed that a default judgment be entered against the respondents. Accordingly, a default judgment was entered against the respondents and in favor of petitioners, on November 2, 1954. That thereafter respondents taking no action to set aside the default judgment, the petitioners thereupon on November 5th, 1955, obtained a Writ of Assistance, a year and a day after the entry of the default judgment.

On November 7th, 1955, the respondents filed their motion in the District Court to vacate the default judgment or in the alternative to stay the Writ of Assistance. Thereafter on November 9th, 1955, the District Court vacated the Writ of Assistance but took no affirmative action on the motion to vacate the default judgment. The petitioners prosecuted an appeal from the action vacating the Writ of Assistance, but the Court of Appeals affirmed the action of the District Court in a per curiam opinion. Said decision is reported in 98 U.S. App. D.C. 262, 235 F. 2d 21.

Thereafter, on the 28th day of September, 1956, petitioners filed their complaint in the District Court in Civil Action No. 3965-56 to construe the scope and effect of the said default judgment, and on the 18th day of October, 1956, the respondents filed in Civil Action No. 1996-53, what they designated as an amended motion to vacate default judgment, said amended motion contained no additional reasons from those expressed in their original motion to vacate default judgment. Thereafter, on November

29th, 1956, the District Court without taking evidence, heard the amended motion to vacate default, and on December 6th, 1956, the said court entered an order granting the motion to set aside the said default judgment. Upon appeal the Court of Appeals affirmed the judgment of the District Court on the 20th day of June, 1957. It is from this judgment of the Court of Appeals that petitioners prosecute this petition for a Writ of Certiorari.

STATUTE AND RULES INVOLVED

The Rules of Federal Civil Procedure are found in 28 U.S.C.A., the pertinent Rules of Federal Civil Procedure and local Rules of the United States District Court for the District of Columbia are set out as follows:

Federal Rules of Civil Procedure:
- Rule 5
- Rule 15 (a)
- Rule 55 (b)
- Rule 60 (b)

District Court Rules:
- Rule 12 (b)
- Rule 14 (i)

Section 57, Judicial Code, U.S.C.
- Title 28, Sec. 118

REASONS FOR GRANTING THE WRIT

1. The conflict among and within the circuits

The judgment of the court below is in direct conflict with the decision of the second circuit in the case of United States vs. Karahalias, 205 F. 2d 331, rehearing at Page 334, where Judge Learned Hand reversing himself, in the light of Klappott vs. United States, 336 U.S. 942, observed while analyzing the Klappott case, Supra,

> "in that case as in the case at bar forcible obstacles were interposed to prevent, or at least greatly to

impede, a naturalized citizen making his defense to an action to cancel his citizenship. The court divided as to the result, the minority holding that Klappott's inaction was neglect—, for which he offered an excuse and that Sub-section 6 did not toll the limitation of the Rule upon any kind of neglect, whatever the excuse might be."

Judge Learned Hand further stated:

"on the other hand the majority held that Sub-section (6) might, and in the case before it did, toll the limitation when the citizen's inaction resulted from forcible obstacles imposed upon his defense. So far we were in accord; but we failed to note our divergence from the majority's reasoning for they held that Klappott's inaction was not neglect at all."

"Moreover, we must retract the construction, we put upon Sub-section (6), and hold that no neglect however excusable will survive the limitation of Rule 60 (b), . . . On the other hand since Karkahalias inaction was not neglect it was not subject to any limitation. Therefore, we hold that as before that if Karkahalias can prove that he was prevented from returning to the United States from the time he learned of the action to cancel his citizenship, the judgment must be opened."

In the instant case there is an affidavit in the record filed by the Assignment Commissioner, D.C., in which he swore that he mailed notice of pre trial to counsel for respondents the same as he did to counsel for the other litigants. Yet, the District Court failed to require the respondents to produce evidence to show that in fact they did not receive the pre trial notice.

The failure of the District Court to compel the respondents to prove their contention of lack of pre trial service is in conflict with the decision of this court in the case of Klappott vs. United States, 336 U.S. 942, there this court in modifying its decision in 335 U.S. 601, said:

"The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with direction to receive evidence on the truth or falsity of the allegation contained in the petition."

In the instant petition the respondents do not present a case such as disclosed by the facts in Klappott case, supra. Respondents' counsel showed neglect in their failure to inquire as to the status of the law suit for a period of over a year. This is a neglect which is subject to the 1 year limitation and cannot be cured by Sub-section (6). If it were to be assumed that the inaction of the respondents warranted consideration under Sub-section (6), the procedure has been set by this court in the Klappott case, Supra, and it was incumbent upon the District Court under the strength of this case to compel the respondents to take testimony to prove the allegations of the amended motion to vacate default judgment.

The opposing view taken by the Court of Appeals in its un-explicated per curiam opinion is that the operation and effect of Rule 60 (b) is left to the discretion of the trial judge and that their construction will be disturbed only for abuse.

2. The importance of the questions involved

Probably the best evidence of the importance of the issues raised in this case is the serious conflict which has developed in the per curiam decisions of the United States Court of Appeals for the District of Columbia Circuit aligned against the Klappott and Karahalias cases, Supra. It is of grave importance for a party litigant to know when he may treat a default judgment as an enforcible judgment.

The Court of Appeals for the District of Columbia Circuit has misconceived the importance of the issues presented by the record to such an extent that it has failed to write an opinion setting forth its reasons for the judgment entered.

In the case of Massa vs. Jiffy Products Co., 9 Cir. (1957), 240 F. 2d 702, the court took the position that the default judgment was sufficiently embracing and that no oral testimony was needed in order to give the judgment finality.

The amended motion of the respondents to vacate default judgment raises the question as to the force and effect of Rules 5 (a) and (b), and 50 (b) (2) of the Federal Rules of Civil Procedure. There is nothing in the opinion of the Court of Appeals which answers any of the issues resulting from the said amended motion of the respondents. The opinion merely states that we find no abuse of discretion. Such opinions are not very helpful in the all important construction of the Federal Rules of Civil Procedure.

There is nothing in the opinion of the Court of Appeals to show how that court met the jurisdictional issue raised by the record and showing that the inaction of the respondents extended beyond the 1 year limitation prescribed under Rule 60 (b).

It is crystal clear that courts are powerless to act under Rules 60 (b), (1), (2), (3), (4), where the inaction of the defaulter has continued for more than a year. In so far as construction and operation of Rules 60 (b), (1), (2), (3), (4), are concerned, the courts cannot act until the defaulter meets the jurisdictional test. Even this court is limited and restricted in its jurisdiction as to the application of the said Rule 60 (b). To state the proposition tersely, this is a court of broad authority but limited jurisdiction and can proceed only when the law permits and in the manner in which the law permits.

It seems to be an unchallenged construction of Rule 60 (b) as aforesaid that if the respondents had hoped to prevail in their motion to set aside the default judgment, the burden was upon them to bring themselves within the exception provided in Subsection (6) of Rule 60 (b) and to satisfy the court that Rule 60 (b), (1), (2), (3) were inapplicable.

If the opinion of the Court of Appeals had held as a matter of law that, apart from the particular facts alleged in respondents' motion, that the default judgment was void for failure to grant respondents a hearing, there would be no need for a remand to take proof of respondents allegations. The lower courts should not have assumed the respondents' verity as a matter of law, especially where the record itself contains strong contradictory evidence.

In the absence of a holding that the default judgment must be vacated irrespective of circumstances alleged in respondents motion to vacate that judgment, and it is assumed that the motion makes a case entitling respondents to consideration under Subsection (6) of Rule 60 (b), we submit that the order vacating the default judgment was premature, until respondents established by clear proof the allegations of their amended motion.

3. The decision of the court below is believed to be erroneous

In the light of the detailed opinions written by the distinguished justices of this court in Klappott vs. United States, 335 U.S. 601 and its reconsideration, 336 U.S. 942, together with the able reconsideration of Judge Learned Hand of the Second Circuit in 205 F. 2d at Page 334, it is evident that the District Court failed to follow the procedure outlined by the above decisions.

It is significant that neither the Court of Appeals nor the District Court gave any reason for their decisions. The respondents stated in their amended motion that the default judgment violated Rules 5 (a), (b), and 55 (b), (2) of the Federal Rules of Civil Procedure. These allegations raise the question as to the proper functions of these Rules. It is admitted that the respondents were in default for failure to appear at pre trial. The question arises therefore as to whether said Rule 5 (a) entitled the respondents

as a default party, to service of the entry of a default judgment.

The further question arises as to whether one in default for failure to appear at pre trial is entitled to any relief under said Rule 55 (a). In this respect the decision of the Court of Appeals is in sharp conflict with a decision of the 5th circuit in the case of Bass vs. Hoagland, 172 F. 2d 205, Cert. denied 338 U.S. 816. There the court took the position that the operation and effect of Rule 55 cease and become inoperative after issues are joined by the pleadings.

Basically the only allegations before the lower courts asserting grounds to vacate the default judgment, were those appearing in the amended motion of the respondents. The allegations laid in the said amended motion were simple unsworn statements. The lower courts gave credence to these allegations against the sworn affidavit of Richard L. Collins, Assignment Commissioner, in which he swore that notice of pre trial was mailed to counsel for respondents. The basic question presented to this court is whether the amended motion survived the limitations contained in Rules 60 (b), (1), (2), and (3). Rule 60 (b), (4), and (5) are not involved. If we indulge the assumption that Rule 60 (b), (6), apply to the amended motion of the respondents then the lower courts have flagrantly failed to apply the rule laid down by this court in the Klappott case, 336 U.S. 942.

CONCLUSION

It is submitted that in view of the importance of the questions raised by the record relative to 1, the jurisdictional limitation under Rule 60 (b), (1), (2) and (3); and 2, the consideration of and procedure established under Subsection (6) of Rule 60 (b), and the obvious failure of the lower courts to follow the mandate of this court as aforesaid, impel this court to effectuate the proper con-

struction of the pertinent Federal Rules of Civil Procedure, heretofore evolved by this court.

WHEREFORE, by reason of the foregoing the petitioners urge the granting of this petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13709

CHARLES STEVENSON, *et al.*, APPELLANTS

v.

RICHARD REED, *et al.*, and FIRST BAPTIST CHURCH OF MARSHALL HEIGHTS, a corporation, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided June 20, 1957

Mr. Everett L. Edmond submitted on the brief for appellants. *Mr. James Washington, Jr.*, also entered an appearance for appellants.

Mr. George A. Parker, with whom *Messrs. Barrington D. Parker* and *Horace O. Pollard* were on the brief, submitted on the brief for appellees.

Before EDGERTON, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

PER CURIAM: This appeal is from an order entered December 6, 1956, vacating a default judgment entered November 2, 1954. We find no error or abuse of discretion.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 47d

CHARLES STEVENSON, HEYWARD BURRELL, FRANK HARLEY, *Petitioners*

v.

RICHARD REED, ARTHUR PAGE, DANIEL TYLER, ET AL., TRUSTEES

and

FIRST BAPTIST CHURCH OF MARSHALL HEIGHTS, INC., *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals has not, yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was issued on the 20th day of June, 1957. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals per curiam decision affirming an order of the United States District Court for the District of Columbia, vacating a default judgment against respondents entered at a pre-trial hearing, without notice to respondents and without hearing or evidence, after respondents had appeared and filed an answer denying petitioners' allegations of ownership of church property and asserted ownership in the respondent church, is in conflict with the decision of this Court in the case of *Klappott* v. *U. S.*, 335 U. S. 601, and as modified in 336 U. S. 942.

2. Whether the order of the District Court, vacating the default judgment and affirmed by the United States Court of Appeals, conflicts with the decision in the case of *U.S.* v. *Karahalias*, 2nd Cir. (1953), 205 F. 2d 331, 334.

3. Whether the District Court was authorized upon consideration of Rule 16, Rule 55(b)(2) and (c), Federal Rules of Civil Procedure and Rule 60(b), (6), Federal Rules of Civil Procedure to set aside and vacate the default judgment.

4. Whether the petitioners are acting in good faith or are they acting for the mere purpose of delay and to prevent the respondents from having the issues raised by the pleadings settled and a judgment determining the ownership of the property entered by the District Court.

STATUTES AND RULES INVOLVED

The Rules of Federal Civil Procedure are found in 28 U.S.C.A., the pertinent Rules of Federal Civil Procedure and local Rules of the United States District Court for the District of Columbia are set out as follows:

Federal Rules of Civil Procedure:

Rule 5
Rule 15(a)
Rule 55(b), (c)
Rule 60(b)
Rule 77(d)

District Court Rules:

Rule 12(b)
Rule 14(i)

Section 57, Judicial Code, U.S.C.
Title 28, Sec. 118

STATEMENT OF THE CASE

The individual respondents are members and trustees of the respondent, First Marshall Heights Baptist Church also known as the First Baptist Church of Marshall Heights, a corporation, and the First Baptist Church of Washington, D. C.

The respondent church was organized by a group of members of the Negro race on August 18, 1938, who by by their joint contributions and the contributions of other persons of the community raised the necessary funds to purchase Lots 14 and 16 in Square 5334 in the District of Columbia and to build the church. The church authorized the petitioners, as its trustees, to purchase the lots in its name, "First Marshall Heights Baptist Church". The petitioners, without knowledge

of the member or the church, took title to the property in their names as trustees of the First Baptist Church of Washington, D. C. The petitioners remained as officers and members of the church until they were removed from office and excommunicated by the church for conduct unbecoming Christians on, to wit, the 8th day of October, 1951. Petitioners thereafter filed a complaint against these respondents in the United States District Court for the District of Columbia, on the 15th day of October, 1951, Civil Action No. 4291-51, alleging that they had been put out of the church wrongfully and as a result of a conspiracy by the respondents and prayed that the Court compel the church to restore them to its membership. The relief was denied and the complaint dismissed.

Thereafter the petitioners filed several other suits against the respondents, which were decided in favor of the respondents. The instant action was commenced in the United States District Court for the District of Columbia on the 2nd of May, 1953, by the petitioners. The complaint is a repetition of the allegations contained in Civil Action No. 4291-51, United States District Court of the District of Columbia, and in Civil Action No. M19030-53, Municipal Court for the District of Columbia, except that in the instant case petitioners allege a fee simple ownership in themselves, individually. The respondents in their answer deny all of the material allegations of the complaint and assert title in the respondent church.

The petitioners claim that they, Charles Stevenson, Heyward Burrell and Frank Harley, are the record title holders. Two (2) deeds, on record in the Office of the Recorder of Deeds for the District of Columbia, show that the property which is the subject of this

litigation, Lots 14 and 16, in Square 5334, was conveyed to *Charley Stevenson* and *Heyward Burrell, Trustees for the First Baptist Church, Washington, D.C.*

After the case was at issue, it was called for pre-trial. No notice of the pre-trial was given or received by counsel for defendants, two (2) to nine (9) inclusive. Notices apparently went to petitioners, as plaintiffs, and to counsel for defendant number one (1), the American Security and Trust Company, a corporation. On October 28, 1954, at pre-trial, because of the absence of counsel for respondents, the pre-trial Judge directed a default judgment against the respondents. No notice of the entry of this judgment was given to respondents or their counsel. No hearing was had and no evidence was taken by the Court. On November 2, 1954, without notice to respondents, either by the Clerk of the Court, or counsel for the petitioners, the pre-trial Judge entered a default judgment against the respondents, without a hearing, or evidence and without deciding the issues raised by the pleadings. The default judgment merely stated that,

> "Upon consideration of the pleadings and the failure of Defendants two through ten inclusive, to appear, it is hereby the Court this 2nd day of November 1954,
>
> ORDERED, DECREED AND ADJUDGED, That plaintiffs are given judgment by default against defendants two through ten inclusive. It is further ORDERED that the complaint against the American Security & Trust Company is dismissed with prejudice".

On November 6, 1955, one year and four days after the default judgment had been entered, respondents were served by the U. S. Marshal with a Writ of

Assistance, which had been issued November 5, 1955. This was their first knowledge of the default judgment. On November 7, 1955, respondents filed a Motion in the District Court to vacate the default judgment or in the alternative to stay the Writ of Assistance. On November 9, 1955, the District Court, after extensive argument by counsel, vacated the Writ of Assistance and stated in its order that respondents are entitled to a hearing of the case on its merits. No action was taken by the Court on the Motion to vacate the default judgment. The petitioners appealed from the order vacating the Writ of Assistance and the U. S. Court of Appeals for the District of Columbia affirmed the action of the District Court. This decision is reported in 98 U. S. App. D. C., 262, 235 Fed. 2d 21.

The default judgment is fatally defective and completely indecisive of the rights of the parties hereto. On the 28th day of September 1956, petitioners filed a complaint for a Declaratory Judgment in the District Court, Civil Action No. 3965-56, to construe the default judgment. This complaint was dismissed on February 11, 1957.

On the 18th day of October 1956, the respondents filed an amendment to its Motion designated as an Amended Motion to Vacate the Default Judgment. Thereafter on the 28th day of November, 1956, hearing was had on the Motion and Amended Motion to Vacate the Default Judgment and on December 6, 1956, the Court granted respondents' Motion to Vacate the Default Judgment. The action of the District Court vacating the default judgment was affirmed on appeal in a per curiam decision by the U. S. Court of Appeals for the District of Columbia on June 20, 1957, because of which petitioners ask for Writ of Certiorari.

REASONS FOR OPPOSING THE WRIT

I

A—The decision of the District Court, affirmed by the Court of Appeals for the District of Columbia, is not in conflict with the decision of this Court in the case of *Klappott* v. *United States*, 335 U. S. 601, as modified 336 U. S. 942.

The *Klappott* case presented questions concerning the power of Federal District Courts to enter default judgments depriving naturalized persons of their citizenship without hearing or evidence, and to set aside such default judgments under circumstances, where justice would be served, four or more years after default was entered. Klappott's petition to vacate the default, filed four years after default was entered stated that he was falsely and unlawfully detained in jail at the time he was notified of the date of hearing and on the date the judgment by default was entered, cancelling his Certificate of Naturalization. He also alleged other obstacles imposed upon him by the Government which prevented him from answering the denaturalization proceedings and from acting on the default judgment until four years thereafter.

The decision of this Court upheld the principle of his right to a hearing before judgment as well as the power of the District Courts to vacate a default judgment under Rule 60(b), (6) of the Federal Rules of Civil Procedure. This Court reversed the District Court and Circuit Court and remanded the case. Upon rehearing to modify it reversed its former decision, remanded the case to the District Court and required Klappott to prove the allegations of his petition to

set aside the default judgment, before the Court should set aside the default judgment. The decision makes it crystal clear why in denaturalization proceedings it established the procedural process laid down in the *Klappott* case. The Court in construing Rule 60(b), (6) held that Klappott was entitled to relief, under the "any other reason" clause, if he established the truth of the allegations of his petition, and that his inaction was not "excusable neglect". The factual situation in the instant case is entirely different from that in the *Klappott* case in its every aspect. In the instant case, the defendants had filed an answer which denied the allegations of the complaint as to the petitioners' ownership of the church property and asserted ownership in the church.

B—The decision of the lower Courts in this case is not in conflict with the case of *Karahalias* v. *United States,* 2 Cir., 205 F. 2d 231. The *Karahalias* case is also one dealing with denaturalization. Karahalias appealed from an order of the District Court denying his Motion to reopen the judgment entered against him by default, cancelling his Certificate of Naturalization. The trial Judge denied his Motion because of his inaction for more than seventeen years and indicated the lack of any reason justifying relief from the operation of the cancellation decree. Action was brought to cancel his Certificate of Naturalization and service was had upon him in the year 1934, and because of his non-appearance a default judgment was entered against him. He filed a Motion to reopen the judgment and alleged in the supporting affidavit that he was unavoidably forced to remain in Greece, his native Country, and did not learn of the entry of the default judgment until the year 1947. He did not deny re-

ceiving copies of the petition and summons. The Second Circuit Court of Appeals followed the decision of this Court in the *Klappott* case, and held that his inaction was not excusable neglect and that he was not subject to the one year limitation of Rule 60(b) but his case fell within subsection (6) of Rule 60(b), Federal Rules of Civil Procedure.

The District Court and the Circuit Court in the instant case recognized and followed the construction placed upon Rule 60(b), (6) by the *Klappott* case and the *Karahalias* case.

C—There is no conflict in the instant case and the decision in the case of *Massa* v. *Jiffy*, 9 Cir., 240 F. 2d 702. This was a suit for unfair competition in the use of a trade mark and for infringement of trade mark. Defendant counter-claimed for declaration of invalidity of the patent, and order of rectification of registration of trademark in favor of defendant. The owner of the patent, which he had not assigned, was made a third-party defendant and a cross complaint was filed against him. Upon third-party's refusal to answer certain interrogatories, the United States District Court for the Southern District of California, Central Division, after hearing, entered default judgment finding patent invalid and that defendant was entitled to registration of the trade mark on proper application. The third-party defendant appealed. The Ninth Circuit Court sustained the District Court and held that the registered owner of an assigned patent and trade mark was properly made a party to the suit and that there was no abuse of discretion by the trial court in entering the default judgment without further proof. On appeal Massa also contended that; (1) he was improperly joined as a third-party defendant, (2) that

the cross complaint for a declaration of invalidity of patent does not state a justiciable controversy, and, (3) that a judgment holding a patent invalid cannot be entered by default without "additional evidence" being taken pursuant to Rule 55(b) of the Federal Rules of Civil Procedure. Massa's deposition had been taken, a hearing was had and findings of fact were made by the District Court.

D—There is no conflict in the Fifth Circuit case of *Bass v. Hoagland*, 172 F. 2d 205, in which certiorari to this Court was denied, 338 U. S. 816. This case is practically on all fours with the instant case. Bass had filed an answer, as in the instant case. No notice of application for default was submitted, in support of the judgment, as in this case. Default was recited in the judgment as its basis when there was no default, but an answer on the merits had been filed as in this case.

Bass, a citizen of Texas, was sued in Kansas by a citizen of Kansas for personal injury resulting from an automobile accident. Plaintiff filed demand for jury trial and Bass never consented to withdrawal of the jury demand. Defense counsel withdrew but did not withdraw the appearance and answer. The judgment indicated that notice of the withdrawal was given defendants, but Bass alleged that he did not know of it. The case came on for trial with neither plaintiff nor defendants present. The trial Judge considered the case in default by reason of previous withdrawal of defendant's counsel. The judgment was not filed until three months later, and no notice was given three days before asking a judgment by default as required by Rule 55(b), Federal Rules of Civil Procedure.

In this case the Court stated that, "when Bass by his attorney filed a denial of plaintiff's case, neither the Clerk nor the Judge could enter a default against him. The burden of proof was put upon the plaintiff in any trial. When Bass nor his attorney appeared at the trial, no default was generated, the case was not confessed. The plaintiff might proceed, but he would have to prove his case. If there was an erroneous idea that absence of counsel caused a default, still Rule 55(b), (2) required that three days notice be given to Bass or his counsel before judgment could be considered", and * * * "To get such judgment without notice is not in our opinion due process of law", said the Court citing *Hovey* v. *Elliot,* 167 U. S. 407, where this Court upheld the right of a three day notice before entry of default judgment.

II

A—This is not a case invoking principles the settlement of which is of importance to the public as distinguished from that of the parties, nor is there a real and embarrassing conflict of opinion and authority between or among the circuits.

The petition for the writ of certiorari completely fails to present a case which calls for the issuance of the writ.

Petitioners urge that the case should be remanded and the respondents required to prove that no notice of pre-trial was received by them or their counsel. They concede that no notice was given as required by Rule 55(b), (2) and 77(d) of the Federal Rules of Civil Procedure. It must be conceded, from the affidavit of the Assignment Commissioner of the District

Court, that *he* did not mail a notice of the pre-trial to respondents nor their counsel. No circuit court has extended the procedural requirement of the *Klappott* case to any other than denaturalization cases and it is obvious that this Court had no intention to do so.

B—The petitioners rest their application upon three grounds:

First, they contend the District Court should have accepted the affidavit of the Assignment Commissioner that a notice of pre-trial was sent to counsel for respondents.

Second, that the failure of counsel to appear at pre-trial on October 28, 1954 constituted a justifiable reason for a default judgment, and

Third, that although the respondents were given no notice of the application for default judgment as required by Rule 55(b), (2), which was entered November 2, 1954 and no notice of the entry of the order as required by Rule 77(d), the Court is without jurisdiction to relieve the respondents from the default judgment under Rule 55(c) and Rule 60(b), (4) or (b), (6), Federal Rules of Civil Procedure.

The position of the petitioners is contrary to the decision, equity, philosophy and construction of the Rules in each of the cases upon which they base their petition for a Writ of Certiorari.

The default judgment fails to settle the issues raised by the pleadings. It makes no finding of fact as to the ownership of the property, which is the subject of this litigation. It is vague, indefinite, unenforceable and void. The District Court properly vacated the default

judgment and the Circuit Court of Appeals properly affirmed its decision.

The record in this case and the statement of facts, in the opinion of counsel for the respondents, clearly and strongly indicate a lack of good faith on the part of the petitioners and a persistent intent on their part to delay the final determination of the issues herein raised.

CONCLUSION

It is respectfully submitted that the jurisdictional limitation under Rule 60(b) of the Federal Rules of Civil Procedure has been settled by this Court, followed by the Circuit Courts and adhered to in this case by the District and the Circuit Court of Appeals and that the petition for the writ of certiorari should be denied, and further that petitioners are not acting in good faith, but to delay the final hearing of this case on its merits.

Respectfully submitted,

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